Supreme Court, U.S.
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No. 03-1390

IN THE

Supreme Court of the United States

WASTE RECOVERY ENTERPRISES, LLC.,

Petitioner,

-v-

TOWN OF UNADILLA and TOWN SUPERVISOR JAMES A. WESTCOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a proper application of New York's severability doctrine by a state court, pursuant to which a town ordinance, imposing criminal sanctions for a violation thereof, which bars the operation of a dump for the disposal of waste is upheld after the court struck down as unconstitutional an exception to the ordinance permitting the operation of a dump for waste on the property from which the waste was generated, is nonetheless constitutionally infirm because it creates an ordinance broader in application than the ordinance was when initially enacted without any further legislative approval.

2. Whether a proper application of New York's severability doctrine by a state court in the above referenced circumstances is nonetheless constitutionally infirm because it fails to give proper notice to the populace that conduct permissible under the exception is now in violation of the ordinance and punishable as a misdemeanor.

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STATEMENT OF THE CASE

A. Petitioner's Constitutional Challenges

The respondent Town of Unadilla is a rural community located in the southern tier of Otsego County, New York. In 1988, the Town adopted Local Law 1 of 1988, a copy of which is annexed to petitioner's petition (Pet. App. B1b), which prohibited in Section 3 the operation or maintenance of a dump for waste in the Town. This local law was adopted under authority given to the Town to regulate solid waste under the New York State Municipal Home Rule Law and New York State Town Law §§130(6) and (15). As set forth in the law's "Declaration of Policy" in Section 1, the Town Board in enacting the law sought to protect town residents from potential hazards and health risks arising out of dumps. However, the local law in Section 4 expressly exempted waste disposed of on the property which produced it. This exemption was designed to provide relief for farms by allowing them to operate small farm dumps in connection with their farming activities.

Subsequently, in 1989 the Town Board enacted Local Law 1 of 1989, which prohibited the importation into the Town of radioactive wastes, hazardous wastes, and solid wastes. Then in 1992, the Town Board reenacted the law as Local Law 4 of 1992 and added medical waste to the list of waste prohibited from being imported into the Town.

In June 1998, petitioner applied to the New York State Department of Environmental Conservation ("DEC") for permit to build and operate a solid waste transfer station and a construction and demolition debris landfill in the Town. Following notice in April 1999 to the Town of petitioner's application and the issuance of construction permits for the two projects in June 1999, petitioner constructed the transfer stations and landfill. Thereafter, in May 2000, the Town notified DEC

of the existence of Local Law 1 of 1989 and Local Law 4 of 1992, which laws would adversely affect petitioner's operation of the transfer station and landfill. At that time, the Town did not cite to Local Law 1 of 1988.

Petitioner then commenced a declaratory judgment action against the Town and its Supervisor, respondent James A. Westcott, wherein the constitutionality of these two local laws was challenged. Respondents answered and asserted a counterclaim seeking to enjoin plaintiff from operating the transfer station and landfill, predicated upon these two local laws and Local Law 1 of 1988 as well. Petitioner replied seeking a judgment declaring that Local Law 1 of 1988 was unconstitutional as well.

In essence, petitioner sought to declare in their entirety Local Law 1 of 1988, Local Law 1 of 1989 and Local Law 4 of 1992 as unconstitutional. Petitioner's constitutional challenge was based upon the Commerce Clause, relying upon several decisions of this Court, including *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Res.*, 504 U.S. 353 (1992).

B. Decisions Below

New York State Supreme Court addressed the constitutionality of all three local laws, as argued by petitioner. (Pet. App. 10a-23a). Initially, it struck down as unconstitutional Section 4 of Local Law 1 of 1988, the law's exemption section, on the basis that the section discriminated against interstate commerce and, thus violated the Commerce Clause. Rejecting petitioner's argument to declare as a result the entire local law as unconstitutional, Supreme Court instead severed that section

from the rest of the local law, pursuant to New York's severability doctrine, and found that the remaining part, including Section 3's ban on the operation of a dump, to be constitutional. Supreme Court then found Local Law 1 of 1989 and Local Law 4 of 1992 unconstitutional as they, like Section 4 of the 1988 law, discriminated against interstate commerce.

As a result of its conclusions, Supreme Court enjoined petitioner from operating its landfill as such operation would be in violation of Section 3 of the 1988 law. However, as Supreme Court further found that the 1988 law did not apply to transfer stations, it denied the Town's request that petitioner be enjoined from operating its transfer station.

On cross-appeals by both petitioner and the Town, the Appellate Division of the State of New York, Third Department, affirmed in its entirety Supreme Court's decision. (Pet. App. 1a, reported at 294 A.D.2d 766). As pertinent here, the appellate court concluded that Supreme Court's severance of Section 4 was proper under New York law. (Pet. App. 6a-7a).

REASONS FOR DENYING THE WRIT

Petitioner argues that Local Law 1 of 1988 should be struck down in its entirety as unconstitutional. Prior to analyzing petitioner's arguments in support, it is worthwhile to analyze two arguments it does not make as such failure reveals much about the lack of merit to the arguments it does make, and why petitioner has failed to present any compelling reason for this Court to exercise discretionary jurisdiction over his appeal of the dismissal of his case.

Initially, it is notable that petitioner makes no argument that the Courts below erred in concluding the ban in Section 3 of

Local Law 1 of 1988 covering all dumps was constitutional and rejecting its Commerce Clause challenge thereto. Such failure is not entirely remarkable in view of the Second Circuit's upholding the validity of a similar ordinance in *Peake Excavating v. Town Bd. of Town of Hancock*, 93 F.3d 68, 74-75 (2d Cir. 1996).

Secondly, petitioner makes no argument that New York's severability doctrine under which New York courts may sever the unconstitutional part of a statute from its constitutional part and permit the enforcement of the constitutional part is per se unconstitutional. The New York test for severability is "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalidity part exscinded, or rejected altogether." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920), cert denied. 256 U.S. 702 (1921) (Cardozo, C.J.); see also *People v. Liberta*, 64 N.Y. 152 (1984), cert denied. 471 U.S. 1020 (1985); *Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 194 (1984). Of note, while the severability doctrine is a doctrine for the state courts to promulgate, see *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d. Cir. 1991), the federal severability doctrine as promulgated by this Court is substantially similar. See, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-685 (1987). The application of the federal doctrine has never been challenged as per se unconstitutional, much less condemned as such. See generally Shumsky, Severability, Inseverability, and the Rule of Law, 41 Harv. J. on Legis. 227 (2004).

With this precedent in place, petitioner thus attempts to circumvent it by arguments which are totally unconvincing and are nothing more than a misguided effort to create issues worthy of this Court's consideration where none exists.

A. The Application Of The Severability Doctrine Here Did Not Result In The Enactment Of A Criminal Statute By A State Court Rather Than The Governing Town Board

Petitioner seeks to find fault with the decisions below because through their application of New York's severability doctrine the courts, instead of the Town Board, enacted a criminal statute, i.e., Section 3 of Local Law 1 of 1988 without any exception. Pet. 5. The argument is meritless.

In view of the historical underpinning of the doctrine, namely the advancement of the legislative body's intent and the need to determine if the legislative body would have intended the enforcement of the unoffending or constitutional part of the statute absent the invalid or unconstitutional part, implicit in a court's application of the severability doctrine to uphold the severed part, as here, is that the legislative body had in effect approved a statute without the severed offending language. See *United Sates v. Jackson*, 390 U.S. 570, 585 (1968). This is especially so when there is, as here, a severability clause in the statute. See, *INS v. Chadha*, 462 U.S. 919, 932 (1983).

Here, the Courts below concluded upon a finding of the Town Board's intent, that the Town Board was enacting a provision of law, Section 3, which it wanted enforced, irrespective of any future striking down of Section 4's exception thereto. Notably, petitioner makes no argument to the contrary regarding the Town Board's intent. With this determination of intent in mind, petitioner's specific argument is clearly devoid of any merit.

Significantly, petitioner cites no authority, case law or commentary, which supports its contention. Suffice it to say, the cases petitioner does cite, *Moses Lake Homes, Inc. v. Grant*

County, 365 U.S. 744 (1961) and *United States v. Bass*, 404 U.S. 336 (1971), are wholly inapposite.

In sum, petitioner's argument is nothing more than a transparent attempt to convince this Court that there is an inherent constitutional problem with the severability doctrine when plainly there is none.

B. The Application Of The Severability Doctrine Here Does Not Result In A Situation Where There Is Now A Failure To Give To The Populace Proper Notice That The Disposal Of Their Own Waste On Their Property Is Now Criminal Conduct

Petitioner also seeks to find fault with the application of the severability doctrine here because with the legal severance of Section 4 from Section 3 of the Local Law 1 of 1988, a property owner in the Town would not know that the disposal of his/her own waste on his/her property is a criminal act because such severance is not then implemented, apparently, by a Town official physically excising Section 4 from the law as available in the Town Clerk's Office or in the Office of the New York State Secretary of State. Pet. 4-5. This argument is also meritless.

To be sure, New York's severability doctrine, like the federal severability doctrine, does not require the physical excising of the offending part of a statute from the publicly available copies of said statute once a court decides to engage in a severance. However, notice of such severance will be available by even a cursory review of the law as interpreted, and as a general practice in New York such declarations of unconstitutionality are noted by the legislative body's officials. Thus, there is surely no need to announce as a matter of federal constitutional law

that application of the severability doctrine requires an actual physical excision of the offending part of the statute.

In sum, petitioner fails to recognize that there are means available to get the word out that a statute has been "severed" because part of it is unconstitutional. There is no need for a constitutional fiat requiring physical excision.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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May 12, 2004